

**IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN**

<b>METROPOLITAN COUNCIL d/b/a METRO TRANSIT POLICE</b>	)	
	)	<b>BMS CASE NO. 08-PA-0766</b>
	)	
<b>“EMPLOYER”</b>	)	
	)	<b>DECISION AND AWARD</b>
<b>And</b>	)	
	)	
<b>LAW ENFORCEMENT LABOR SERVICES, INC. LOCAL NO. 192</b>	)	<b>RICHARD R. ANDERSON</b>
	)	<b>ARBITRATOR</b>
	)	
<b>“UNION”</b>	)	<b>September 16, 2009</b>

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**JURISDICTION**

The hearing in the above matter was conducted before Arbitrator Richard R. Anderson on August 18, 2009 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced into evidence by both parties and received into the record. The hearing closed on August 18, 2009. Timely briefs were mailed by the parties and received from the Union by regular mail on September 5, 2009, and from the Employer on September 8, 2009. A reply brief was received from the Employer on September 11, 2009 at which time the record was closed and the matter was then taken under advisement.

This matter is submitted to the undersigned Arbitrator pursuant to the terms of the parties’ May 1, 2005 through April 30, 2008 collective bargaining agreement, hereinafter the Agreement, which was in effect during the time period involved herein.<sup>1</sup> The relevant language in Article 7 of the Agreement [EMPLOYEE RIGHTS—GRIEVANCE PROCEDURE]

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<sup>1</sup> Joint Exhibit No. 1.

provides for the arbitration to resolve all grievance issues. The parties stipulated that the instant grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve contract arbitrability or any other procedural issue.<sup>2</sup>

## **APPEARANCES**

### **For the Employer**

Andrew D. Parker, Attorney  
David H. Indrehus, Metro Transit Police Chief  
Andrew J. Olson, Metro Transit Police Deputy Chief  
Sandi Blaeser Metropolitan Council Assistant Director Human Resources  
David I. Schachter, Attorney

### **For the Union:**

Christopher K. Wachtler, Attorney  
Donald Marose, Grievant, Minnesota State Patrol Trooper Sergeant and former Metro Transit Police Officer  
Todd Waxberg, Minnesota State Patrol Trooper and former Metro Transit Police Officer  
Paul Van Voorhis, Minnesota State Patrol Trooper Lieutenant and former Metro Transit Police Officer

## **BACKGROUND**

Metropolitan Council, hereinafter the Employer, is the regional planning agency serving the Twin Cities seven-county metropolitan area and providing essential services to the region including the operation of the region's largest bus and rail system known as Metro Transit. Metro Transit has its own police force known as Metro Transit Police. David Indrehus and Andrew Olson are the Chief and Deputy Chief, respectively, of a Department that currently consists of approximately 100 full-time and 55 part-time Patrol Officers, hereinafter Officers<sup>3</sup>. In 2007, there were approximately 33 full-time and 100

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<sup>2</sup> During the hearing a procedural issue developed over the introduction of private personnel records. This matter was resolved when the undersigned Arbitrator issued an Order that private personnel records including documents proffered pursuant to signed releases would be allowed into the record with the understanding that the evidence was to be maintained confidentially by all parties. Further, that upon conclusion of the proceedings, said evidence would be returned to the respective parties who introduced it or alternatively destroyed by this Arbitrator. The parties stipulated to abide by said Order.

<sup>3</sup> Any reference to Officers will mean part-time Officers unless otherwise indicated.

part-time Officers. The part-time Officers are represented in a separate bargaining unit by Law Enforcement Labor Services, Inc Local 192, hereinafter the Union, and have been since approximately 2000.

Don Marose, hereinafter the Grievant, received written notification from Captain Robert Elmers on October 23, 2007<sup>4</sup> that he was going to be suspended on November 9th and terminated from his position as a part-time Officer on November 16th for failure to attend fall 2007 training pursuant to Section 404.04 of the Employer's Policy & Procedures Manual.<sup>5</sup> The Grievant subsequently received his suspension letter from Captain Elmers on November 9<sup>th</sup> and termination letter from Chief Indrehus on November 16th.<sup>6</sup> In his letter, Chief Indrehus stated, "*Section 402.04 states that failure of any officer to attend in-service training or firearms qualification will result in that officer's ineligibility to work in any capacity for the Metropolitan Transit Police Department. You did not attend Fall In-Service.*"

The Grievant filed a grievance on November 9<sup>th</sup> protesting his suspension and pending termination alleging that the Employer violated the just cause standard in Article 10 of the Agreement.<sup>7</sup> Deputy Chief Olson denied the grievance in a letter to the Grievant on November 15<sup>th</sup>, citing Chief Indrehus' reason for termination.<sup>8</sup> On November 26<sup>th</sup>, Union Business Agent Brooke Bass appealed the Grievance to Step 2 of the grievance procedure in a letter to Chief Indrehus.<sup>9</sup> Deputy Chief Olson responded in writing to Business Agent Bass on December 3<sup>rd</sup> denying the grievance.<sup>10</sup> Thereafter, Business Agent Bass appealed the grievance to Step 3 in a letter to Human Resources Director

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<sup>4</sup> Unless otherwise indicated, all dates are in 2007.

<sup>5</sup> Employer Exhibit No. 12.

<sup>6</sup> Joint Exhibit No. 2 and No. 5, respectively.

<sup>7</sup> Joint Exhibit No. 3.

<sup>8</sup> Joint Exhibit No. 4.

<sup>9</sup> Joint Exhibit No. 6

<sup>10</sup> Joint Exhibit No. 7.

Gloria Heinz dated November 29<sup>th</sup>, which Heinz denied on December 24<sup>th</sup>.<sup>11</sup> The Union subsequently filed for arbitration, whereupon the undersigned Arbitrator was notified in writing by Union Staff Attorney Tiffany Schmidt on April 7, 2008 that I had been selected as the neutral Arbitrator in this matter. An initial hearing scheduled for September 11, 2008 was subsequently cancelled by the parties. The hearing was rescheduled on May 19, 2009.

## **THE ISSUE**

The parties stipulated to the following issue, *“Whether the Employer terminated the Grievant Donald Marose for just cause pursuant to the collective bargaining agreement, and if not, what shall the remedy be?”*

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 5 — EMPLOYER AUTHORITY**

**5.1** *The EMPLOYER retains the full and unrestricted right to operate and manage all workers, facilities, and equipment; to establish functions and programs; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules, and to perform any inherent managerial functions not specifically limited by this AGREEMENT.*

**5.2** *Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish or eliminate.*

### **ARTICLE 7 — EMPLOYEE RIGHTS- GRIEVANCE PROCEDURE**

#### **7.1 DEFINITION OF A GRIEVANCE**

*A grievance is defined as a dispute or disagreement as to the interpretation or application of the specific terms and conditions of this AGREEMENT.*

#### **7.5. ARBITRATOR’S AUTHORITY**

**A.** *The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this AGREEMENT. The arbitrator shall consider and decide only the specific issue(s) submitted in writing by the EMPLOYER and the UNION, and shall have no authority to make a decision on any*

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<sup>11</sup> Joint Exhibit No. 8 and No. 9, respectively.

*other issue not so submitted.*

**B.** *The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the EMPLOYER and the UNION and shall be based on the arbitrator's interpretation or application of the express terms of this AGREEMENT and to the facts of the grievance presented.*

## **ARTICLE NO.10 — DISCIPLINE**

**10.1.** *The EMPLOYER will discipline employees for just cause only. Discipline will be in one of the following forms:*

- A.** *Oral Reprimand*
- B.** *Written Reprimand*
- C.** *Suspension*
- D.** *Demotion, or*
- E.** *Discharge*

**10.2.** *Reprimands, suspensions demotions and discharges will be documented in written form.*

**10.3.** *Written reprimands, notices of suspension and notices of discharge which are to become part of an EMPLOYEE'S personnel file shall be read and acknowledged by signature of the EMPLOYEE. EMPLOYEES and the UNION shall receive a copy of such reprimands and/or notices.*

**10.4.** *EMPLOYEES may examine their own individual personnel file at reasonable times under the direct supervision of the EMPLOYER.*

**10.5.** *Discharges of non-probationary employees shall be preceded by a five (5) day suspension without pay.*

**10.6.** *EMPLOYEES will not be questioned concerning an investigation of disciplinary action unless the EMPLOYEE has been given an opportunity to have a UNION REPRESENTATIVE present at such questioning.*

**10.7.** *EMPLOYEES shall not be disciplined by reduction or elimination of hours without disciplinary notice.*

**10.8.** *Information generated by an internal affairs investigation will not be shared with the officer's home agency. Only upon request after a final determination has been made and appeals have been exhausted, shall the DEPARTMENT make available limited information on a complaint, i.e., name, issue of the complaint and whether it has been sustained or not sustained. It is understood that the EMPLOYER will not violate any provisions of the Minnesota Government Data Practices Act in the application of this article.*

**MINNESOTA CHAPTER 473 — METROPOLITAN GOVERNMENT**

**473.407 Metropolitan transit police**

**Subd 1. Authorization.** *The council may appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c), and establish a law enforcement agency, as defined in section 626.84, subdivision 1, paragraph (h), known as the metropolitan transit police, to police its transit property and routes, to carry out investigations, and to make arrests under sections 629.30 and 629.34. The jurisdiction of the law enforcement agency is limited to offenses relating to council transit property, equipment, employees, and passengers.*

**Subd. 6. Compliance.** *Except as otherwise provided in this section, the transit police shall comply with all statutes and administrative rules relating to the operation and management of a law enforcement agency.*

**MINNESOTA CHAPTER 626.8452—DEADLY FORCE AND FIREARMS USE; POLICIES AND INSTRUCTION REQUIRED.**

**Subdivision 1.** *Deadly force policy. By January 1, 1992, the head of every local and state law enforcement agency shall establish and enforce a written policy governing the use of force, including deadly force, as defined in section 609.066 by peace officers and part-time peace officers employed by the agency. The policy must be consistent with the provisions of section 609.066, subdivision 2, and may not prohibit the use of deadly force under circumstances in which that force is justified under section 609.066, subdivision 2.*

**Subd. 2.** *Deadly force and firearms use; initial instruction. Beginning January 1, 1992, the head of every local and state law enforcement agency shall provide instruction on the use of force, deadly force, and the use of firearms to every peace officer and part-time peace officer newly appointed by or beginning employment with the agency. This instruction must occur before the agency head issues a firearm to the officer or otherwise authorizes the officer to carry a firearm in the course of employment. The instruction must be based on the agency's written policy required in subdivision 1 and on the instructional materials required by the board for peace officer and part-time peace officer licensure.<sup>12</sup>*

**Subd. 3.** *Deadly force and firearms use; continuing instruction. Beginning January 1, 1992, the head of every local and state law enforcement agency shall provide the instruction described in subdivision 2 to every peace officer and part-time peace officer currently employed by the agency. This instruction must be provided at least once a year.*

**Subd. 4.** *Record keeping required. The head of every local and state law enforcement agency shall maintain written records of the agency's compliance with the requirements of subdivisions 2 and 3.*

**Subd. 5.** *Licensing sanctions; injunctive relief. The board may impose licensing sanctions and seek injunctive relief under section 214.11 for failure to comply with the requirements of this section.*

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<sup>12</sup> Chapter 626.84 Subdivision 1 (a) "Board" means the Board of Peace Officer Standards and Training (POST).

## **METROPOLITAN TRANSIT POLICE DEPARTMENT PROCEDURE—WORK SCHEDULES**

### **202.03 POLICY**

**A.** *Work schedules are to be submitted on a bid sheet that will cover a two (2) week period. All schedule bids are to be returned to the Police Administrative office prior to the due date as listed on the bid sheet. All officers must work a minimum of twenty-four (24) hours every four (4) weeks. Officers will be allowed to designate a total of four (4) one-week periods throughout the year as vacation. These periods of time will not be counted against the 24-hour per work requirement.*

**B.** *When an officer is scheduled for a shift it shall be that officer's duty to work the shift bid or to find another officer to fill that shift. An officer must report to the Transit Police Duty Lieutenant any scheduling change.*

**1.** *If the officer:*

**a.** *Fails to work a scheduled shift; or*

**b.** *Fails to find a replacement officer to work in that officer's place within four (4) hours of his/her scheduled shift; or*

**c.** *Fails to notify the Transit Police Duty Lieutenant that the officer cannot work; or*

**d.** *Fails to report for duty ready for service at the scheduled time for the shift to begin; or*

**e.** *Fails to work a complete shift; then*

*The officer will receive a WRITTEN NOTICE of the occurrence and be provided an opportunity to give a written response.*

**2.** *Three (3) such occurrences within any six (6) month period will require a meeting with the Patrol Captain to provide a plan to meet the department service requirements. Failure to do so and/or continued occurrences will be grounds for dismissal.*

**C.** *Officers who fail to meet total minimum service requirements in any three (3) month period will be notified of their deficiency. Officers will be required to submit a written response indicating how they will meet department service requirements and/or document mitigating circumstances.*

**D.** *Decisions of the Patrol Lieutenants relative to this policy may be appealed to the Captain of Patrol. Decisions of the Captain may be appealed to the Chief of Police, whose decision in the matter will be final. Failure to meet departmental service requirements (exclusive of authorized mitigating circumstances) for periods totaling six (6) months or more in any one (1) year period will be grounds for separation from the Metro Transit Police Department.*

## **METROPOLITAN TRANSIT POLICE DEPARTMENT PROCEDURE—TRAINING SECTION 2.**

### **402.00 INTRODUCTION**

*Regular Training benefits both police officers and the public. The Transit Police encourage and require all it's (sic) officers to undergo periodic training annually. This policy establishes uniform procedures to conduct, coordinate and schedule In-Service Training, including but not limited to: Spring In-Service, Fall In-Service, Firearms Qualification and other training for Transit Police Officers and Supervisors.*

#### **402.01 PURPOSE**

*The purpose of this section is to establish regularly scheduled training for Transit Police Officers and Supervisors, and actions for failure to meet these standards.*

#### **402.02 PROCEDURES - IN-SERVICE TRAINING**

*In-Service Training will consist of a block of instruction that will be held twice yearly at designated times established by the Training Division.*

- A. The scheduling of in-service training, as well as the subject matter, must be pre-approved by the Chief of the Transit Police.*
- B. All training sessions will be conducted at a location established by the Transit Police Training Division.*
- C. Each officer will be notified by mail of the training dates prior to the upcoming training session.*
- D. All officers are responsible for reporting to training on time.*
- E. Reading of newspapers or magazines other than class material will not be allowed in the classroom.*
- F. Officers only attend the session for which they have signed up.*
- G. An attendance record shall be maintained by the instructors. Each officer is responsible for signing the record. Upon completion of training, the attendance record shall be approved by the Training Officer who will forward the information to the Police Officers Standards and Training Board (POST) to ensure each officer is afforded proper credits.*

#### **402.03 PROCEDURES FOR FIREARMS QUALIFICATION**

*Mandatory firearms qualifications will be conducted annually for all officers.*

- A. All firearms qualifications will be conducted at a location established by the Transit Police Training Division.*
- B. Each officer will be notified by mail of the date and time of the qualifications.*
- C. No officer or supervisor may call the range directly and arrange a qualification time through the Range Master.*
- D. Upon arrival at the range, each officer will fill out a firearms attendance sheet listing the type of weapon and ammunition they are using to qualify. Officers are only to qualify with the weapon(s) used while working for the Transit Police Department. These sheets will be maintained by the Range Officer and upon completion of officers (sic) qualification these sheets will be forwarded by the Range Officer to the Transit Police Training Division.*

#### **402.4 DISCIPLINARY ACTION**

*Any officer on a leave of absence from the Transit Police Department will be required*

*to attend all scheduled In-Service and Firearms qualifications . Failure of any officer to attend In-Service Training or Firearms Qualifications will result in that officer(s) ineligibility from working in any capacity for the Transit Police Department. If an officer fails to attend in-service due to mitigating circumstances, that officer shall document, in writing, the reasons/circumstances for the failure to attend in-service and forward this request to the Training Coordinator. The Training Coordinator will review the request and if the absence is excused, will forward a request to the Chief of Police for reinstatement and make-up training.*

## **FACTS**

The Employer was authorized under Minnesota Statute Chapter 473.407 Subd.1 to create a Metro Transit Police Department, hereinafter the Department, and that it “*shall comply with all statutes and administrative rules relating to the operation and management of a law enforcement agency*”.<sup>13</sup>

The Department’s jurisdiction is limited to the Employer’s transit property, equipment, employees and passengers for both the bus and rail system throughout the seven county metropolitan area, which is soon to be expanded to an eight county jurisdictional area with the advent of the Sherburne County to Hennepin County Northstar commuter rail line.

The mission of the Department is to provide security and safety for bus and light rail passengers, customers and employees. In this regard it is charged with policing its transit property and routes, to carry out investigations, and to make arrests. In carrying out this mission, Officers often face difficult and extremely dangerous situations in their day-to-day work. These include homicides, serious gang activity, armed robbery, theft, fighting and terroristic threats. Officers must be prepared to handle these situations in the unique bus and rail environment while performing their law enforcement duties.

As stated earlier, the Employer employs both full-time and part-time Officers.<sup>14</sup> The Employer’s part-time Officers are actively employed full-time by other law enforcement

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<sup>13</sup> Employer Exhibit No.1.

<sup>14</sup> Prior to 2002, all of the Officers were part-time.

agencies and hold POST licenses.<sup>15</sup> Except for those Officers hired before January 1, 1995, Officers are no longer eligible to work for the Employer in a law enforcement capacity if their employment at their home law enforcement agency ceases.<sup>16</sup> Pursuant to the Employers Policy & Procedure Manual Section 202.3, part-time Officers are required to work a minimum of 24 hours in any four week period.

Minnesota Statute Chapter 626.8452, subd. 3 and 4 requires that every law enforcement agency must provide its officers deadly force and firearms use training before they are allowed to carry a firearm and this training must be provided at least once a year. The Statute mandates that the required training be based on the Employer's own written policy and instructional material that has been approved by the POST Board. The Employer's Policy & Procedures Manual contains the Employer's Training Policy, herein after Training Policy or Policy. Section 402.4 requires a half day of training in both the spring and fall of each year. The Policy also subjects an Officer to discipline if the Officer fails to attend this training even if the Officer is on an approved leave of absence.

All Officers receive a copy of the Policy & Procedure Manual and acknowledge receipt. The Grievant last signed an acknowledgement that he had received and reviewed this Manual on October 9, 2006.<sup>17</sup>

The Employer's training is conducted by Centurion Skills, Inc. which contracts with the Employer to provide the use of force and firearms training. The training curriculum used by Centurion for times relevant herein was approved by the POST Board on October 26, 2006 and is effective until October 26, 2009.<sup>18</sup> The approved training curriculum devotes

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<sup>15</sup>POST sets the licensing standards that are required by all law enforcement officers employed by non-federal jurisdictions.

<sup>16</sup> Appendix A of the Agreement. Joint Exhibit No. 1.

<sup>17</sup> Employer Exhibit No. 9

<sup>18</sup>The regiment used was based upon the curriculum that Centurion sought approval in its application for continuing education credit for the Officers. The POST Board approves courses for credit to ensure that officers earn a minimum of 24 hours of continuing education every three years. Employer's Exhibit No. 6.

25 to 50 percent of each session to transit-specific training including scenarios geared toward safety on buses and trains. The approved training program also splits the training into two separate four-hour sessions. According to Deputy Chief Olson, this provides ease of scheduling for the Officers who are working full-time jobs elsewhere. Similar training at one's home agency does not relieve an Officer from this requirement. Finally, it allows officers to receive training on firearms and issues unique to transit operations every six months rather than twelve.

The Grievant is currently employed as a full-time Trooper Sergeant for the Minnesota State Patrol, and was so at the time period relevant herein. He was initially hired as an Officer by the Employer in June 1993. On August 15, 2007, Lieutenant Joe Cardenas, who was in charge of the fall training, sent all Officers, including the Grievant, an internal memorandum apprising them of the need to sign up for training on either October 3<sup>rd</sup>, 10<sup>th</sup>, 13<sup>th</sup> or 17<sup>th</sup>.<sup>19</sup> Lieutenant Cardenas also informed the Officers that, "*Attendance at one of the sessions is mandatory in order to be eligible to continue working for the department. The labor agreement mandates that officers on leaves of absence will attend the training.*"

The Grievant signed up for the last training session scheduled for October 17<sup>th</sup> 5:00 p.m. to 9:00 p.m. Lieutenant Cardenas called the Grievant when he failed to show up for the training. According to the Grievant, Cardenas called him at approximately 5:40 p.m. and inquired why he was not at training and directed him to report. The Grievant testified that he told Cardenas that he had forgotten about the training and that it was impossible for him to get there before 7:00 p.m.<sup>20</sup> As a result the Grievant decided not to attend the training session.

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<sup>19</sup> Employer Exhibit No. 10.

<sup>20</sup> Training was being conducted near the intersection of Interstate 494 and Highway 169 while the Grievant was in the White Bear Lake, Minnesota area. The distance between the two locations on opposite sides of the Metro area is

The next morning the Grievant sent an e-mail to Deputy Chief Olson, Captain Elmers and Lieutenant Cardenas that states,<sup>21</sup>

*I signed up for training last night. To put it bluntly, I forgot (no excuse). I appreciate Lieutenant Cardenas calling to remind me. Unfortunately, I was tied up with something that would have delayed me (even further) getting there. I fully understand the policy about attending training and bidding shifts. Under the "it never hurts to ask" doctrine, I was wondering if there is a way that I can make up the necessary portions of training in order to still bid shifts.*

On October 23<sup>rd</sup>, the Grievant received a letter, herein after "intent letter", from Captain Elmers informing him of his suspension and upcoming termination for failure to attend training.<sup>22</sup> The letter also invited the Grievant to come in and discuss the matter. The Grievant subsequently had a meeting with Captain Elmers wherein again the Grievant acknowledged missing training. According to the Grievant, he offered to make up the training at his own expense. Captain Elmers agreed to forward the information to Chief Indrehus. The Grievant testified that during the meeting Captain Elmers never raised any of his performance or hour issues.<sup>23</sup>

On November 1st the Grievant sent an e-mail to Captain Elmers with copies to Chief Indrehus and Business Agent Bass that states,"

*Thank you for the opportunity to discuss this issue with you. I could give a list of reasons why I missed training, but there isn't anything that would suffice. However, the week of October 15 was extremely hectic and I had some personal issues arise. But, as I said, there is no excuse (other than simply, I forgot).*

*I fully understand the policy and the need to maintain a trained staff. I hold the officers involved in the programs that I coordinate to the same standard.*

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approximately 30 miles. Normal travel time is approximately 40 minutes, however during the height of the evening rush hour, the travel time would be significantly greater.

<sup>21</sup> Employer Exhibit No. 11.

<sup>22</sup> The "intent letter". Joint Exhibit No. 12.

<sup>23</sup> It appears that the Grievant had not complied with the minimum 24 hours in a four week work requirement of the Department.

*I have been an employee of Metro Transit Police for 14½ years. I have enjoyed my time working for MTPD and enjoy the camaraderie of working with officers from diverse backgrounds.*

*I would like to continue my employment with MTPD and would request an open conversation to discuss any possible options for maintaining my employment. I am willing to complete the training on my own time and at my own expense. I would also be interested in the possibility of taking an official leave of absence until the next training opportunity.*

After the discussion with Captain Elmers, the Grievant worked a previously scheduled eight hour shift on November 2<sup>nd</sup>. Thereafter, the Grievant received his November 9<sup>th</sup> suspension letter that included the intent to terminate him on November 16<sup>th</sup>.<sup>24</sup> The Grievant's termination letter from Chief Indrehus subsequently issued on November 16<sup>th</sup>.

<sup>25</sup> The letter states,

*Per previous correspondence dated October 23 and November 9, 2007, you were notified of our intention to terminate you based upon the fact that you had not met the following requirement:*

*Section 402.04 states that failure of any officer to attend in-service training or firearms qualification will result in that officer's ineligibility to work in any capacity for the Metropolitan Transit Police Department. You did not attend Fall In-Service.*

*This letter will serve as your formal termination effective today, November 16, 2007.*

*You will need to sign and return the enclosed forms, along with any Metro Transit Police.*

*Dept. issued items that you have in your possession, to Captain Elmers no later than Friday, November 30, 2007.*

The Grievant filled out a Leaving Service form on November 30<sup>th</sup> indicating that his separation was involuntary.<sup>26</sup> Captain Elmers signed the form on December 3<sup>rd</sup>. In the Manager Section of the form is the category "Employee is eligible for rehire" with the options of "Yes", "No" and "Conditional". Captain Elmers left this item on the form blank.

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<sup>24</sup> Joint Exhibit No.2.

<sup>25</sup> Joint Exhibit No.5.

<sup>26</sup> Employer Exhibit No. 14

Deputy Chief Olson testified that standard operating procedure is to issue an “intent letter” that informs an Officer that he/she is going to be suspended and subsequently terminated for missing training and inviting the Officer to come into discuss the matter. If the Officer supplies a sufficient reason for missing training, he/she is allowed to make-up the training in the year missed or they do not work until they complete training the following year according to Deputy Chief Olson. He testified that they checked the records back to the year 2000 and discovered that at least 40 Officers either resigned or were terminated after they missed mandatory training.

The Employer introduced evidence through Deputy Chief Olson that the Employer has consistently followed its Termination Policy that Officers who missed training were ineligible to work for the Employer. For the period beginning in the spring of 2003 and ending in the fall of 2007, 26 Officers, excluding the Grievant, had their employment severed because they missed training.<sup>27</sup> Those Officers had between two and 18 years of service with the Employer.<sup>28</sup>

Seven of the 26 Officers were also notified that the action was also being initiated for violating Department Policy & Procedures 202.01-03, sub. a & b (not working at least 24 hours in a four week period). Twenty-four of the Officers resigned, seven of whom resigned prior to receiving the “intent letter”. One Officer was terminated when he failed to respond to the “intent letter”. All except the latter Officer were eligible for rehire. There was another Officer’s record contained in Employer Exhibit No. 20. His termination was not carried out after the “intent letter” issued because he was on active duty in Afghanistan during the training period. He later concurrently resigned from his home law enforcement agency and the Employer.

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<sup>27</sup>Officer’s records. Employer Exhibit No. 20.

<sup>28</sup> Employer Exhibit No. 22.

The Employer also introduced evidence that termination pursuant to its Policy continued after 2007.<sup>29</sup> An Officer failed to sign up for fall 2008 training; and when contacted by Lieutenant Cardenas, resigned before any “intent letter” was sent. Another Officer signed up but failed to attend spring 2009 training. When contacted by Deputy Chief Olson, he indicated his intention to resign from his home law enforcement agency in May 2009, which would make him ineligible to work for the Employer. Deputy Chief Olson further stated that this Officer indicated that he had signed up for shifts in April and May 2009 and wanted to know if he could still work the shifts. According to Deputy Chief Olson, he was told that he was no longer eligible to work for the Employer. The Officer never sent a resignation letter and was subsequently terminated in July 2009.<sup>30</sup>

There were other Officers who had missed training during the period of spring 2003 through the fall 2008. The Employer introduced Exhibit No. 23 that indicates 17 Officers were not terminated for missing training because they had approved leaves of absence for military or medical reasons. Deputy Chief Olson testified that those Officers who returned to work either attended make-up training or did not return until they completed the next training session.

The lone exception was full-time Officer Lieutenant Bob Jensen who did not attend fall 2006 training because he was on an approved medical leave of absence for a job-related injury during fall 2006 training. He also did not attend a December 31, 2006 make-up training session scheduled for him and four other Officers who had also missed the previous fall training. Lieutenant Jensen returned to work in January and worked before the spring 2007 training was conducted. According to Deputy Chief Olson, this was his administrative mistake.

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<sup>29</sup> Employer Exhibit No. 20.

<sup>30</sup> Letter to the Officer dated July 23, 2009 from Deputy Chief Olson. Exhibit No. 20.

Full-time Officer Fillipi, who also missed the fall 2006 training because of approved medical leave, attended the December 2006 make-up training. According to Deputy Chief Olson, she was allowed to work before the make-up training. This may have technically violated the Training Policy; however, it did not violate the POST requirement because she completed both required training sessions in 2006. Officers Bartz and Swenson also missed the fall 2006 training and attended the make-up training.<sup>31</sup> Deputy Chief Olson testified that they too may have worked before the December make-up training.

Deputy Chief Olson further testified that the December 31, 2006 make-up training was the only make-up training ever conducted by the Department and was only for those Officers that had missed previous training because of approved medical reasons or because they were reinstated per a Union Grievance.

Deputy Chief Olson testified that former Officer Paul VanVoorhis also returned to work before attending spring training after missing the fall 2002 session. Officer VanVoorhis was on an approved leave of absence during the scheduled training.<sup>32</sup> He requested to return to work after his leave of absence was up. This prompted Lieutenant Ottoson to send a January 8, 2003 memorandum to then Captain Indrehus requesting his decision on Officer VanVoorhis' status since he had missed the previous training session.<sup>33</sup> Captain Indrehus subsequently approved Officer VanVoorhis' return to duty before he completed the next training (spring 2003) in a memorandum to Lieutenant Ottoson dated January 15, 2003.<sup>34</sup> The memorandum states,

*Monday, January 13, 2003 Captain David Indrehus reviewed the status of Officer Paul Van Voorhis and made the following determination:*

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<sup>31</sup> Both were reinstated per a Union grievance after the fall training.

<sup>32</sup> Union Exhibit No. 5, pgs. 4 and 5.

<sup>33</sup> Id., p. 6. Lieutenant Ronald Ottoson had previously sent a memorandum dated October 28, 2002 to Captain Indrehus informing him that two Officers, Waxman and VanVoorhis, had missed the fall training and stated that they were ineligible to work until the March 2003 training. Union Exhibit No. 4, p. 5.

<sup>34</sup> Id., p. 7

*Officer Van Voorhis' Leave of Absence has expired.*

*Officer Van Voorhis did not attend Fall Inservice (sic) Training but did sent (sic) a letter of explanation concerning the circumstances for his absence. This letter was in accordance with Metro Transit Police Policy.*

*The letter was reviewed and a determination made that Officer Van Voorhis would be allowed to return to work and would attend the next Inservice (sic) Training Class conducted in March of 2003.*

*Officer Van Voorhis is a member of the Minnesota State Patrol and received Use of Force Training as part of his regular training.*

Thereafter, Officer VanVoorhis worked a number of shifts before the spring 2003 training session.

Officer VanVoorhis also missed fall 2005 training and received an "intent letter" dated November 4, 2005 from then Chief Jack Nelson. He later had a meeting with Chief Nelson to discuss this issue. During the course of the discussion, Officer VanVoorhis testified that Chief Nelson informed him that he was a "good Officer", "did not cause problems", "did good work" and "wanted a commitment from him that he would work the required hours".<sup>35</sup> There never was a discussion about make-up training. Officer VanVoorhis stated that he could not give a commitment and subsequently resigned because he did not want a termination or a suspension on his employment record.<sup>36</sup> His Leaving Service form stated that he was eligible for rehire.<sup>37</sup>

Deputy Chief Olson testified that former Officer Todd Waxman was the only Officer in his search of records that did not have a valid excuse for missing training and was allowed to work thereafter anyway. Officer Waxman, who was and still is a State Trooper, testified that he was employed as a part-time Officer from 1993 until April 2003. He

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<sup>35</sup> Officer VanVoorhis had not worked the required hours and received a letter from Chief Nelson on November 2, 2004 informing him that he was violating the hours' policy. Id., p. 8.

<sup>36</sup> Id., p. 9.

<sup>37</sup> Id., p. 10.

missed a lot of work in early 2002 as a result of transferring to Pine County and having a new baby that he provided day care for when his wife was working. His primary employment and his day care duties made it difficult for him to sign up for shifts. He applied and received a six-month leave of absence effective July 1, 2002.<sup>38</sup> He later signed up for but then missed fall 2002 training.

Officer Waxman further testified that he never received an "intent letter". He acknowledged that training was very important; and in fact, the leave of absence letter that he received from Chief Nelson stated, "*As you stated in your letter, you are required to attend training while on a Leave of Absence from the Metro Transit Police Department*"<sup>39</sup>. The next contact with the Employer was in the spring of 2003 when he received a phone call from Lieutenant Cardenas who was inquiring whether he was going to continue his leave or come back to work. According to Officer Waxman, Lieutenant Cardenas never discussed the missed fall training or that he had to make up training before he could come back to work. His understanding of the conversation was that he could come back to work or resign. He decided to resign on April 1, 2003, which was approved on April 8<sup>th</sup>.<sup>40</sup> His Leaving Service form indicated that he was eligible for re-hire.

Deputy Chief Olson testified that suspending an Officer until the next training session would create additional scheduling problems. An Officer who wanted a vacation could merely miss training and be off for the whole summer or winter, which ever applied. This would exacerbate the scheduling problem that the Employer already has.<sup>41</sup>

Officer Waxman also testified that the training was different every year. The training normally consisted of use of force, review of the Statutes (law) and firearms qualification,

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<sup>38</sup> Id., pgs. 2-3.

<sup>39</sup> Id., p. 3.

<sup>40</sup> Id., pgs. 7-9.

<sup>41</sup> Employer Exhibit No.. 24

which were similar to the training that he received at the State Patrol. He did acknowledge, however, that the training also involved certain aspects namely use of force scenarios unique to transit operations.

The Grievant also testified that much of the training was similar to that received at the State Patrol. Although the State Patrol did not have bus/train scenarios, they had use of force training and defensive tactics dealing with drivers and passengers in motor vehicle settings. He last received State Patrol training in the fall of 2007.

During the course of the hearing, the Union introduced a document (Union Exhibit No. 7) entitled Non-Attendance Data containing a list of 77 Officers who had purportedly missed training between the spring of 2000 through the fall of 2007. Under a column headed Process, the document lists the reasons various Officers missed training (Leave of Absence, Medical or Military) and whether an “hours” warning or termination letter issued. A final column lists the Officer’s Disposition (Terminated or Resigned).

The Employer raised a foundation objection to the introduction of the document. The Union then called Human Resource (HR) Assistant Director Sandi Blaeser as a witness to lay foundation for the document’s introduction. HR Assistant Director Blaeser testified that although she furnished the document to the Union (date unknown), she had not prepared or instructed the individual (unnamed Department Administrative Assistant) to prepare this document. She also testified that she could not verify the accuracy or completeness of the document. She further testified that she received this document in the Grievant’s grievance packet when she assumed her current position in March 2008. The document was received into evidence with the caveat that the undersigned Arbitrator would determine the “weight” given to it in my subsequent deliberation and Decision.

## **EMPLOYER POSITION**

The Employer's position is that it had just cause to suspend and then terminate the Grievant. The termination in this case was entirely appropriate and consistent with long-standing application of the Training Policy. The Department's "intent letter" has been sent to Officers who missed training with no mitigating excuse consistently for years without any challenge from either the Union or the Officer. The parties have thus exhibited a mutual understanding of how Policy violations for missing training will be handled.

The Employer argues that the Grievant's termination was appropriate for several reasons:

- The Policy specifically addresses reinstatement only in situations where mitigating circumstances exist. Since none exist here, any award other than denial of the grievance in this case would constitute a re-writing of the Policy.
- The Grievant violated a significant and important Policy that warrants termination. This Policy is mandated by Statute and approved by the POST Board.
- The Grievant's action was an egregious violation of the Policy with no excuse or explanation provided. The Grievant should not be rewarded for his blatant violation of the Policy.
- The application of the Policy has been consistently applied. Many Officers have been held to the standard now being challenged by the Grievant. It would be unjust to apply an exception to the Grievant when none has ever been applied to any other Officer.
- If the Employer allowed any Officer leave or opportunity for make-up training when no mitigating circumstance existed, it would allow any Officer to simply decide that for any host of reasons they do not wish to come to training and instead do it six

months later. If the Employer were to allow this, it would create an administrative scheduling nightmare and inevitably result in creating more open shifts with a concurrent loss of police coverage with significant compromises to safety.

- It is important that rules, laws, and significant policy mandates not be ignored by law enforcement officers sworn to enforce the laws themselves. A certain standard of adherence and commitment must be demanded. Any form of reinstatement in this case would completely undermine this important principle.
- Finally, this was an Officer who had not even been working requisite shifts over the past couple of years. The Grievant worked only three shifts in the five months leading up to his termination. This happened even after he had failed to meet his 24 hour per month commitment in 2006 and had stated in writing that he was committed to a full hourly schedule going forward. It must also be remembered that this is not termination of an employee's full-time primary employment. This is establishing ineligibility for working for the Employer on a part-time basis.

The Employer further argues that the parties' collective bargaining agreement demands the denial of the grievance. Article 7.5 (B) states that, "*The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law*".

This Arbitrator would be violating this provision by sustaining the grievance because:

- The Department's Training Policy is statutorily required and has been approved by the State agency (POST Board) for maintaining standards and licensing. The Policy sets forth that any Officer who misses training will no longer be eligible to work for the Employer. The Policy also sets forth the conditions that an Officer may be reinstated.

- This Arbitrator's action of sustaining the grievance would result in a wholesale rewriting of the Policy without any review or approval of the POST Board.
- The parties have agreed that this Arbitrator has no authority to act contrary to Article 7.5 (B). Likewise, the Policy may also not be modified, added to, or subtracted from by this Arbitrator.
- Any form of reinstatement would be a complete rewriting of the Policy.

The Employer also argues that the Union's arguments for the Grievant's reinstatement are misplaced and wholly unpersuasive because:

- The Union's claim that the Policy does not call for termination is incorrect.

The Policy states specifically that an Officer is ineligible "*from working in any capacity for the Transit Police Department*". This has always been interpreted by the parties to mean termination unless there are mitigating circumstances. Moreover, this is made clear by the word "reinstatement" in the last sentence of this Policy which states, "*and if the absence is excused, will forward a request to the Chief of Police for reinstatement and make-up training*".

Officers knew this and resigned after receiving an "intent letter", some even before the letter issued. There has not been one Officer who has challenged the termination consequences of missing training in all of the years that the Policy has been in effect. There also has never been a grievance filed over the "intent letter" or subsequent suspension/termination letter issued to an Officer. This has even been the case when it involved a full-time Officer.

- The claim that this is a case of selective application of the Policy is equally specious.

The Employer cited example upon example of when an “intent letter” was sent to an Officer who missed training. The only exception to this was when Officer Waxman missed training in the fall of 2002. This was an administrative error.

This Policy was also applied to Officer VanVoorhis who missed training in the fall of 2002 and received an “intent letter”. The reason he was not terminated and retained his employment was because he had a legitimate mitigating reason for missing training. When he again missed training in the fall of 2005, he was sent an “intent letter” that subsequently resulted in him resigning his position. Allowing Officer VanVoorhis to work in the spring of 2004 before training was an error. This error in application of the Policy has no relevance to whether an Officer like the Grievant with no mitigating reason to explain his absence should be allowed to retain his employment.

- The claim that make-up sessions should be allowed in the Grievant’s situation is wrong.

The Employer has had only one make-up session for Officers who previously missed training and it was only for those Officers that had an excused absence from training based upon mitigating circumstances. The make-up session involved several Officers and was held because the Employer wanted to get them back to work as quickly as possible.

- The claim that missing training is simply not significant because it is the same training in the spring as in the fall and the same training as received by Officers through their home agencies is incorrect. The Union’s attempt to minimize the importance of the Employer’s training is not credible.

The Employer's training is statutorily required which the POST Board reviewed and approved. It approved a program that required two half-day spring and fall training programs for Officers. It did not approve a program in which Officers could take either fall or spring training. In addition, the POST Board responded in the affirmative to an inquiry whether the Department was required to provide training separate from the Officers' home agency.

A substantial percentage of the training provided by the Employer is transit specific and geared toward scenarios that might occur on a bus or train. This sort of training is not provided by an Officer's home agency. Finally, the Training Policy, which has been consistently applied, has always required training in both the spring and the fall regardless of whether an Officer has received separate training from their home agency or other source.

- The claim that termination is inappropriate because progressive discipline was not followed in this case is misplaced.

It is a well-established arbitration principal that, depending on the facts, discharge may result on a first occurrence of an employee's policy violation particularly when, as is the case here, the Policy explicitly makes the Officer ineligible for working for the Department. Moreover, this Policy has consistently been applied.

The Union attempts to cite Article 10 in the Agreement for support to the contrary is misplaced. There is no reference to progressive discipline anywhere in Article 10. Rather, the only place in the Agreement which the parties decided to require any prerequisite to termination is in Section 10.5 of the Labor Contract which states that a discharge of non-probationary employee shall be preceded by a five-day suspension without pay.

The application of progressive discipline in this case would be entirely inappropriate in view of the Employer's consistently applying a termination discipline for an Officer missing training when no excuse or mitigating circumstance exists.

- The Union's argument that because Officers who faced termination and resigned were eligible for rehire, the Grievant should not have been terminated is both contentious and specious.

There are many cases involving termination for policy violations or infractions such as failing to maintain proper licensure or credentials that may not cause an employer to forever render the employee unemployable by the employer. Eligibility for rehire does not undermine the validity of the Training Policy calling for termination for an unexcused absence from training, a Policy approved by the POST Board.

- The Union's argument, citing Union Exhibit No. 7, that the Grievant should be reinstated because the Employer has selectively applied its Training Policy is flatly wrong and not supported by the evidence.

The Union is using this document to claim that the Employer excluded information about certain Officers. Through this document, they are attempting to rebut the testimony of Deputy Chief Olson who testified that every individual who missed training without a valid excuse between the years 2003 and the present time are listed on Employer Exhibit No.'s 20 and 21; and those that had a recognized excuse, received leave and an opportunity to train later are listed on No. 23.

It would be entirely inappropriate to make the decision in this case based on a document which had little or no foundation and no explanation for its content when the Employer has introduced overwhelming evidence regarding the consistent application of termination in cases involving an unexcused absence from training.

The Union has had this document for months and could have obtained records related to the named Officers or sought to discover what the information on the document meant.

- The claim that termination is inappropriate because the Employer was looking for a way to reduce part-time staff is also specious.

The Union introduced evidence at the hearing indicating that the Employer had for the last several years been moving away from using more full-time and less part-time Officers. This fact is not disputed, however, it is irrelevant. The fact that there are fewer part-time Officers working at the Department is due primarily to the continuing and ongoing problem of filling shifts and the Department's difficulty in maintaining the necessary commitment from Officers working on a part-time basis, and does not in any way establish that termination is inappropriate in this case.

### **UNION POSITION**

The Union's position is that the Employer did not have just cause to terminate the Grievant. The Agreement has a just cause provision with progressive discipline in Article 10. The Employer failed to abide by this provision. It is undisputed that the Grievant missed fall 2007 training. There were no mitigating circumstances for his missing the training and discipline may be warranted. However, the discipline imposed does not meet the acceptable standards that have been established in arbitration proceedings. The basic elements of "just cause" have been reduced to seven tests initially set forth by Arbitrator Carroll R. Daugherty in *Enterprise Wire Co. and Enterprise Independent Union*, 46 L.A. 635 (1966). These are,

1. Notice. Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

2. Reasonable rule or order. Were the employer's rules reasonably related to (a) the orderly efficient and safe operation of the employer's business; and, (b) the performance that the employer might properly expect of the employee?
3. Investigation. Did the employer before administering the discipline to an employee make an effort to discover whether the employee did, in fact, violate or disobey a rule or order of management?
4. Fair investigation. Was the employer's investigation conducted fairly and objectively?
5. Proof of the investigation to the judge. Did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Equal treatment. Has the employer applied its rules, orders and penalties even handedly and without discrimination to all employees?
7. Penalty. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense; and, (b) the record of the employee in his/her service with the employer?

The Employer failed in satisfying the criteria in at least three of the tests—Notice, Equal Treatment and Penalty. The Union argues that Officers were not put on "Notice" that they would be terminated if they missed training.

- Throughout the hearing the Employer's lone witness Deputy Chief Olson continually misstated the Training Policy. The Policy does state that an Officer is ineligible to work for the Employer if they have missed training; however, the Policy does not state that an Officer will be terminated for missing training.
- The Employer consistently blurred the line between "ineligible" and "no longer". The term "ineligible" leaves room for discretion for an Officer to continue working even though they missed training.
- Deputy Chief Olson testified that sometime in 2003 Chief Indrehus directed the Department to make an effort to track training records and "tighten down" on the training policy but never apprised Officers of this or made an attempt to amend the policy.

The Union also argues that “Equal Treatment” was not afforded the Grievant. The Grievant was treated disparately when he was not allowed to work after missing training or given make-up training to allow him to work.

- The Employer allowed Officers to miss training and work. Former Officer Waxman was allowed to work after his leave of absence even though he missed the fall 2002 training, which was conducted while he was on a leave of absence.

Former Officer VanVoorhis was allowed to work even though he also missed the fall 2002 training while on a leave of absence. He worked the following January through March before the spring 2003 training.

Officer VanVoorhis missed fall 2005 training again; but was told by then Chief Nelson that he was a “good Officer” and could “stick around” if he could commit to more shifts, which implied he could continue to work even though he missed the fall 2005 training.

Lieutenant Jensen and Officer Phillip were also allowed to work shifts even though they missed training. The same was true for Officers Bartz and Swenson.

The Union argued in its brief that Union Exhibit No. 7 discloses that a number of Officers missed training prior to 2003. The Employer never introduced evidence to substantiate, as it did for the Officers in Employer Exhibit No.’s 20 and 21 that they either resigned or were terminated; or that those Officers who were on a medical or military leave of absence completed training before going back to work.

There was also no evidence about the legitimacy of any of the Officer’s leaves of absence. Finally, there was no evidence presented to determine whether any of the Officers on approved medical or military leave underwent training before they were allowed to return to work.

It would be impractical for the Union to attempt to bring in all of these Officers to explain each and every situation that led to training being excused or conversely generated a termination letter; however, it seems highly unlikely that Officers VanVoorhis and Waxberg are the only two Officers who were not terminated for missing training and given the opportunity to continue working for the Employer. The question becomes: how many exceptions to the rule or “errors” or “mistakes” must occur before it can be said that the Policy has been selectively enforced against the Grievant.

- Officers were eligible for rehire even though they missed training. The Leaving Service forms in Employer Exhibits No. 20 and 21 disclose that all of the Officers who resigned were eligible for rehire. The Grievant’s form did not disclose whether or not he was eligible for rehire. However, Deputy Chief Olson testified that he could see no reason why he would not be eligible for rehire.
- The Grievant offered to go on a leave of absence and/or pay for training in order to be eligible for work, which the Employer denied.
- The hearing disclosed that the “bus scenario” portion of the training was unique to the Department. Other training, such as the use of force and firearms training, was essentially the same as the training the Grievant and former Officers Waxman and VanVoorhis received through State Patrol. The Employer essentially acknowledges this in a January 15, 2003 memo from Lieutenant Ottoson to then Captain Indrehus, wherein the final paragraph states, “*Officer Van Voorhis is a member of the State Patrol and received use of force training as part of his regular training*”. Clearly the Department was taking this into consideration in allowing Officer VanVoorhis to return to work before attending the training class in March of 2003.

The Union also argues that the “Penalty” for the Grievant’s missing training was too severe.

- The Employer failed to follow progressive discipline pursuant to Article 10.1 in disciplining the Grievant.
- A termination should only be assessed after the four lesser forms of discipline in the policy have been progressively applied. Progressive discipline implies that employees will be given an opportunity to correct behavior before recourse to termination occurs. There is no evidence that lesser discipline would be futile in correcting the Grievant’s behavior.
- The Grievant’s October 23<sup>rd</sup> “intent letter” informs him that he is to be both suspended and terminated. Clearly, the suspension penalty was a mere formality.
- Except for a letter he received in 2006 for not working enough hours, the Grievant had a spotless record of employment. Evidence at the hearing disclosed numerous other Officers also received letters involving a violation of the Employer’s Work Policy, some on a continual basis.

### **OPINION**

The issue before the undersigned is whether the Employer had just cause pursuant to the Agreement to terminate the Grievant for failing to attend fall 2007 training; and if not, what is an appropriate remedy. This issue presents a well-settled two-step analysis. First, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances.<sup>42</sup> It is the Employer’s burden to establish that the

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<sup>42</sup> Elkouri & Elkouri, HOW ARBITRATION WORKS p. 948(6th ed. 1997)

Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

Based upon all the evidence adduced, the Employer had just cause to discipline the Grievant. It is clear that the Grievant failed to attend the fall 2007 training session conducted by the Employer on October 17<sup>th</sup>; and admittedly, had no excuse for not attending other than he “just forgot”. It is also clear that his non-attendance violated the Employer’s Training Policy (402.00). This Policy, which had been approved by the POST Board, established mandatory training attendance, absent mitigating circumstances, in both the fall and spring even if an Officer was on an approved leave of absence.. This Policy also established that the failure to attend a training session would result in discipline (402.04).

The Union raises a “notice” issue. The evidence clearly establishes that the Grievant had “notice” that if he missed the fall 2002 training session, or for that matter any training session he was “ineligible” to work for the Employer, which is tantamount to discipline. The Policy was disseminated to all Officers including the Grievant who subsequently signed an acknowledgement (August 2000 and October 2006) that he understood and received a copy of the Policy. The Grievant was also apprised by Lieutenant Cardenas by a memorandum dated August 15<sup>th</sup> which was sent to all Officers stating that disciplinary action would result if an Officer, absent mitigating circumstances, failed to attend the fall 2007 training.

The Union’s argument that the Grievant was treated disparately has no basis. The only evidence presented by the Union that an Officer was not disciplined for missing training without a valid excuse was the situation involving former Officer Todd Waxman in the fall of 2002; a situation that the Employer admitted was an administrative error.

Further, the Union's contention that former Officer VanVoorhis was invited by then Captain Nelson to continue working without undergoing training after he missed the fall 2005 training without a valid excuse constitutes disparate treatment is groundless. The statements allegedly made to Officer Van Voorhis are hearsay and in and of themselves do not form a basis for disparate treatment. According to Officer VanVoorhis' own testimony, the subject of training never came up during his conversation with Captain Nelson. In addition, Officer VanVoorhis provided no evidence to show what conditions would precipitate his continued employment, e.g. return with no discipline; return with some form of discipline; or termination followed by a rehire.

Even assuming arguendo that Officer VanVoorhis and Officer Waxman could continue to work after missing training without a valid excuse, two incidents (one of which is highly speculative and the other an administrative error) occurring during the period 2003 - present time when the Employer was consistently enforcing a disciplinary process for unexcused missed training does not constitute sufficient disparate treatment or otherwise relieve the Grievant from any disciplinary action.

The Union contends that its Exhibit No. 7 would show disparate treatment had the Employer presented evidence with respect to the Exhibit. As the Employer states, this allegation is flatly wrong and not supported by the evidence. The Union's reliance upon its Exhibit No. 7 has little evidentiary value for the reasons argued by the Employer. The document in and of itself does not establish any disparate treatment. Granted, it would be a hardship to bring all the Officers in to testify; however, the Union had other alternatives.

The Union, according to the Employer, had the document for months. The Union could have requested the personnel records of the Officers on the Exhibit during grievance processing; or at the very least, could have arranged with the Employer to bring

the personnel records of those Officers to the hearing.<sup>43</sup> The Union then could have developed testimony from those personnel records just as the Employer did when Deputy Chief Olson testified concerning the personnel records in Employer Exhibit No.'s 20 and 21. The Union did query Deputy Chief Olson about certain Officers on that list—Jensen, Fillipi, Bartz and Swenson. The Union could also have extended its query of Deputy Chief Olson to include the other Officers on the list, but failed to do so. I therefore see no merit in the Union's attempt to use this extrinsic evidence to refute the direct testimony of Deputy Chief Olson, who testified that Officer Waxman was the only Officer without a legitimate excuse who was not disciplined for missing training.

The Union's attempt to show that a handful of Officers including Officer VanVoorhis were allowed to work before the next training session after they missed their scheduled training has no nexus for establishing disparate disciplinary treatment. All of the Officers in question were on approved leaves and were not subject to discipline. The same is true for the Union's argument that all the Officers who resigned were eligible for rehire while the Grievant initially was not. I again fail to see the nexus between rehire eligibility and disparate disciplinary treatment.

There is also no merit to the allegation that the Grievant should not be disciplined because he offered to undergo training at his own expense. Deputy Chief Olson testified that this option has never been available to Officers. There is also no merit to the Union's argument that the Employer should have allowed the Grievant make-up training as it has done for other Officers. The evidence clearly establishes that make-up training was only made available to Officers who had legitimate excuses for missing training. Further, make-up training was only made available one time in 2006 when a number of eligible Officers received the training. Finally, Section 402.4 of the Training Policy mandates

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<sup>43</sup> If the Employer refused, the Union could have subpoenaed the records.

make-up training for Officers with mitigating reasons for missing scheduled training. Clearly, the Grievant was not in this category.

The Union also argued that the Grievant should not have been disciplined for missing training because he had recently undergone essentially the same training at the State Patrol that the Employer offered. This argument is also rejected. The evidence did show many similarities; however, the Grievant as well as former Officers Waxman and Van Voorhis, who were also concurrently employed by the State Patrol when they worked for the Employer, testified that the bus/train scenarios were unique to the Employer. The Training Policy specifically mandates training attendance and makes no distinction for the substitution of home agency training for the Employer's. Deputy Chief Olson testified that this has been the Employer's Policy since the inception of the Department. Finally, the Union presented no evidence to contradict the Policy or Deputy Chief Olson's testimony.

In view of the foregoing, I reject the Union's argument that the Grievant should not have been disciplined because of the Employer's "notice" deficiencies or lack of equitable treatment or for any other argued reason.

Having determined that the Employer had just cause pursuant to the Agreement to discipline the Grievant, the penalty imposed needs to be examined to satisfy the second standard of just cause. The Employer raises a number of persuasive arguments in its brief mandating termination.

First, the Employer argues that the Training Policy requires termination. The Employer has interpreted the language in Section 402.4 of the Training Policy which states, "*Failure of any officer to attend In-Service Training or Firearms Qualifications will result in that officer(s) ineligibility from working in any capacity for the Transit Police Department.*" to

mandate termination. In doing so it equates the term “*ineligibility from working*” with termination. The term could equally apply to a suspension

Section 402.1 of the Policy requires “all it’s (sic) *officers to undergo periodic training annually* [Emphasis added]. This applies even to those Officers on a leave of absence (Section 402.4 Disciplinary Action).<sup>44</sup> Assuming, as the Employer argues, that this clause applies to all Officers; then according to the Policy, any Officer who misses training is “*ineligible from working*” and must be terminated. However, not all Officers are terminated. Only those Officers who did not have a valid excuse for missing training were summarily terminated. The Employer applied the “*ineligible from working*” language differently to Officers on medical or military leave. They were not terminated. At least there was no evidence presented that they were.<sup>45</sup>

Once an Officer receives an “intent letter” he/she can, according to Section 402.4 of the Policy, document in writing to the Training Coordinator that their failure to attend training was “*due to mitigating circumstances*”. If the absence is excused, the Training Coordinator will forward the request to the Chief of Police for “*reinstatement and make-up training*”. The Officer is not terminated; rather, they are returned to duty once the Officer undergoes the required training. One Officer, VanVoorhis, returned to duty before he made up or attended the next training session.

You can call this interim period a leave of absence or anything you want to. The effect is that the employee is suspended from further duty until he/she completes the requisite training. Thus, it is clear that the term “*ineligible from working*” is not only synonymous with termination.

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<sup>44</sup> An argument could be made that Section 402.4 only applies to Officers on a leave of absence; however, there is no necessity to raise it in view of the subsequent discussion.

<sup>45</sup> The lone exception was the Officer who was terminated while on military leave to Afghanistan, which was later rescinded.

Second, the Employer argues that the undersigned Arbitrator has no authority to modify, add to, or to subtract from the Training Policy, adding that any form of reinstatement would be in effect rewriting the Employer's Training Policy without POST Board Approval. The undersigned Arbitrator is not making or even advocating a single change in the Policy. My role is to interpret the language of the Policy, including the term "*ineligibility from work*", which I have done herein.

Third, the Employer argues that it has consistently applied its Policy to require termination if an Officer fails to attend training without a valid excuse. The Employer added that not one Officer or the Union ever objected to its termination action. The Union disagrees and cites a number of reasons where termination had not occurred. Assuming *arguendo* that the Employer is correct and termination pursuant to its Policy has been consistently enforced, this in and of itself does not per se justify the Grievant's termination. The evidence disclosed that only a couple of Officers besides the Grievant were ever terminated. Most resigned either before or after they received the "intent letter". There may have been valid reasons why either the Officer or the Union never questioned the "intent letter". It is entirely possible that the Officer in question did not have any intention of continuing his/her employment. Just because the Union has never filed a grievance in the past does not foreclose the Union from forever grieving this action. This is especially true where there is no evidence that the Union has waived this right.

Fourth, the Employer argues that any discipline short of termination will result in Officer abuse. The Employer presented evidence that it has had a difficult time filling shifts mainly during the summer months when most Officers take vacation; however, in recent years this has been a year-round problem. The Employer contends that if there was a suspension option for missing training, Officers would take advantage of this in

order to have a long unapproved vacation and then return to work without any consequences. This does pose a dilemma for the Employer; however, it is a Human Resource problem and has no bearing on the Grievant's situation since there is no evidence that this was the Grievant's motive. In fact the opposite was true. He wanted immediate make-up training and was willing to pay for it out of his own pocket. Finally, if the Employer had evidence that an Officer deliberately missed training in order to get time off without any consequences, this or any other Arbitrator would have a hard time sustaining his termination solely for this reason.

Fifth, the Employer argues that the Grievant's termination should be upheld because he had also been violating its "hours" Work Policy (Work Schedules 202.03). The Grievant was terminated for missing training and not for an "hours" violation. That issue is not before me; however, it is a factor relevant to an appropriate penalty.

Sixth, the Employer argues it can terminate an Officer without evidence of prior discipline. Further, Article 10.1 is not a progressive disciplinary provision. The Employer is correct that an employer can summarily terminate an employee for a policy or work rule violation under a just cause standard even when there is a progressive disciplinary policy in their collective bargaining agreement. This has been applied egregious misconduct such as theft, drug use, work place threats or violence, sexual harassment, and major insubordination to mention just a few. In doing so, the employer is saying that the employee is guilty of industrial "capital punishment" and is not redeemable or fit for further employment. Where there has not been egregious misconduct, an employer is governed by the contract's progressive disciplinary steps before terminating an employee.

The language in Article 10.1 does not clearly or unequivocally state that the discipline is progressive; however, it does progressively number the various forms of discipline from

the least to most severe. This is a major factor that supports the Union's contention that the disciplinary provisions in Article 10.1 are progressive. Further, the language in Article 10.5 calling for a five-day suspension before actual termination does not impact or contradict the progressive disciplinary provision argument. The five-day suspension before termination is more of a procedural requirement rather than an independent disciplinary action.

Seventh, the Employer argues that reinstatement would undermine the principle that Officers who are sworn to enforce laws themselves are mandated to follow rules, laws and significant employment policies. I do not disagree that Officers as well as all employees are expected to follow rules, laws and significant policies. I do disagree that this conduct then gives an employer a per se "just cause" right to terminate an employee. If this were the case all an employer would have to do is show that a policy had been violated in order to sustain a termination. This would totally undermine the arbitral process. Nevertheless, it may be a factor in determining the severity of a penalty assessed.

I have carefully reviewed those arguments and have determined that while termination may be appropriate, it is not the only discipline available. While the Union's arguments involving "notice" and "equitable treatment" were not established in finding just cause to discipline the Grievant, the arguments need to be resurrected in order to determine if termination was the appropriate discipline under all of the circumstances present.

The Grievant had 14½ years of dedicated service during which time the only blemish on his record was the failure in 2006 to work the required monthly 24 hours in a one month period for which he received a letter from Captain Nelson asking for an explanation. It is unknown whether this letter was discipline pursuant to Article 10.1, but it

was a warning that he needed to come into compliance. The Grievant also had problems satisfying the “hours” Work Policy in 2007; but never received a similar letter from higher command. This inability to satisfy the “hours” Work Policy was not mentioned either in his “intent letter” or the suspension/termination letter.

There were also Training Policy violations that resulted in no discipline, namely former Officer Waxman was never issued an “intent letter” and was even allowed to continue to work after he missed fall 2002 training. Former Officer Van Voorhis also missed fall 2002 training; however, he had an excused leave of absence. Nevertheless, he should not have been allowed to work again until he completed the next training cycle, but he was. There was also evidence that Officers Jensen, Fillipi, Bartz and Swenson were allowed to work before they completed their next training cycle.

The Employer introduced evidence that all of the Officers who chose to resign rather than be terminated for missing training were eligible for rehire. Deputy Chief Olson also testified that although a rehire option on his Leaving Service form was left blank, he saw no reason why the Grievant would not be eligible for rehire.

As stated earlier, termination is Industrial capital punishment. When the Employer terminated the Grievant he was in essence telling him that he had committed an egregious work place violation and was unfit to work for the Employer. I find it odd that termination is appropriate here yet the Grievant is, as were other Officers in similar circumstances, eligible for rehire when the next training cycle begins. The sole reason this previously “unfit employee” is now eligible for employment is that he/she can now complete the requisite yearly training. The same fate befalls Officers that are on an approved leave or have “mitigating circumstances” who also cannot return to duty until they complete the next training cycle. Both can return to duty. The difference is the later

was on a technical suspension while the former was terminated with the loss of seniority and all the benefits that inure from seniority.

. This would mean 14½ years in lost seniority for the Grievant. Termination plus the loss of 14½ years of seniority strikes me as a severe and overly harsh penalty to pay when the Employer had another option available. If the Grievant was eligible for rehire, as Deputy Chief Olson testified, what is the purpose of termination when the result would be the same if the Grievant was suspended? Both options render him ineligible to work until the next training cycle and satisfies the literal interpretation of the disciplinary provision in the Training Policy without violating POST Board requirements.

Therefore, I see no reason to terminate a long-tenured employee with a good work record when a suspension would achieve the same result, namely punishment for missing training. This holds true even if there was not a progressive disciplinary provision in the Agreement, as the Employer argued. Moreover, there were similar “egregious breaches” of the Training Policy and no discipline was forthcoming. It is likely that corrective rather than punitive action will convey the same message to the Grievant and his fellow Officers—adherence to the Training Policy is critical; and if you fail to do so, punishment will occur.

Based on all the evidence adduced, I conclude that although the Employer was justified in disciplining the Grievant, termination was harsh and severe and constituted punitive rather than corrective action. There were also mitigating circumstances present that warranted a reduction in the severity of the Grievant’s discipline.

The Grievant’s misconduct, however, warrants more than a mere slap on the wrist. Although there is no evidence that the Grievant had ulterior motives or that he deliberately missed the fall 2007 training session, it does constitute a serious breach of the Employer’s

Training Policy. Therefore, a suspension retroactive from November 16, 2007, the date of his termination, until the first day of the spring 2008 training session is appropriate discipline under all of the circumstances herein.

Further, the Grievant will receive back pay from that spring 2008 training date until he returns to duty or rejects reinstatement. The back pay for the period from the first training date in spring 2008 through November 15, 2008 will be calculated based on the actual number of hours that he worked during the same period in 2007. The back pay for the period November 16, 2008 through December 31, 2008 will be calculated based on the number of hours for the same period in 2006.<sup>46</sup> The back pay from January 1, 2009 through the date of his reinstatement or declination of employment will again be calculated based on comparable hours worked in 2007. The Grievant will also receive his 2007 uniform allowance and a pro-rated uniform allowance for 2009, if he returns to work. Since he did not actually work in 2008, a uniform allowance for that year is not appropriate.

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<sup>46</sup> This is the last comparable period that the Grievant worked.

## **AWARD**

IT IS HEREBY ORDERED that the grievance in the above entitled matter as it relates to the imposition of discipline shall be and hereby is dismissed for the reasons set forth in this Decision.

IT IS FURTHER ORDERED that the grievance in the above entitled matter as it relates to the discipline imposed shall be and hereby is sustained for the reasons set forth in this Decision.

IT IS FURTHER ORDERED the Grievant's termination is reduced to a suspension period as set forth in this Decision; and any reference to his termination shall be expunged from his personnel file, consistent with my Decision herein.

IT IS FURTHER ORDERED that the Grievant be made whole for any loss of wages, economic benefits, seniority, or any other benefits or rights or privileges suffered as a result of the termination imposed as set forth in this Decision, less any interim earnings earned outside his employment with the State Patrol.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

**Dated: September 16, 2009**

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**Richard R. Anderson, Arbitrator**